88-895

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

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Case #_____

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN J STANTON,
Appellant

v

DISTRICT OF COLUMBIA
COURT OF APPEALS,
Appellee

APPEAL FROM THE DISTRICT OF COLUMBIA
COURT OF APPEALS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is the District of Columbia (DC) Bar procedure in disciplinary cases of deferring rulings on motions raising the due process issue of fair notice of the charges until factfinding has been completed repugnant to constitutional due process?

2. Are DC Bar disciplinary rules DR6-101(A)(3) and DR7-101(A)(1) construed to obligate attorneys to pursue client objectives "as they see them" in "fidelity to the client's judgment" void for vagueness and overbreadth?

3. Do DC Bar disciplinary rules DR6-101(A)(3) and DR7-101(A)(1) so construed subvert the constitutional guarantee of assistance of counsel in criminal cases?

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OPINION BELOW

The text of the unpublished 19 May 1988 memorandum opinion and judgment of appellee District of Columbia Court of Appeals in Case #87-383 is reproduced and appended to this statement.

JURISDICTION

Jurisdiction is invoked under United States Code (1982 Ed) Sec 28-1257(2) for review of the 19 May 1988 judgment of appellee District of Columbia Court of Appeals in Stanton v District of Columbia Court of Appeals, #87-383, made final 1 September 1988 by an order (reproduced and appended to this statement) denying rehearing and affirming on res judicata ground the dismissal of appellant's challenge to the constitutionality of

JURISDICTION

(continued)

appellee's disciplinary rules construed to obligate attorneys to pursue client objectives "as they see them" and affirming on indistinct ground the dismissal of appellant's challenge to the constitutionality of appellee's rule governing motions procedure in bar disciplinary cases.

A notice of appeal from appellee's judgment was filed 23 November 1988 in the District of Columbia Court of Appeals.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

"No person ... shall be deprived of ... property without due process of law," Amendment 5, United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

(continued)

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of ... property without due process of law, Amendment 14, United States Constitution.

"In every criminal prosecution, the accused shall ... have the assistance of counsel for his defense," Amendment 6, United States Constitution.

"A lawyer shall not ... neglect a legal matter entrusted to him," Disciplinary Rule 6-101(A)(3), District of Columbia Bar.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

(continued)

"A lawyer shall not intentionally ... fail to seek the lawful objectives of his clients through reasonably available means permitted by law," Disciplinary Rule 7-101(A)(1), District of Columbia Bar

"All motions directed to the manner in which the hearing is to be conducted shall be ruled upon by the hearing committe chair or the chair's designee either at a prehearing conference as provided in Rule 7.14 or at the time of the hearing. In the case of a motion directed to the admissibility of evidence, the evidence, if oral, shall be heard by the committee and, if documentary, shall be included in the

CONSTITUTIONAL PROVISIONS,
STATUTES, REGULATIONS INVOLVED

(continued)

record, and the hearing committee shall include in its report to the board a recommendation for disposing of the motion, except that if the hearing committee chair determines that the evidence is privileged, irrelevant, or merely cumulative, the chair may exclude the evidence after allowing the proponent to make a proffer on the record. As to all other motions, the hearing committee shall include in its report to the board a proposed disposition and the reasons therefor. The board shall rule on all such motions in its disposition in the case," Board on Professional Responsibility Rule 7.13, District of Columbia Court of Appeals (1983).

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN J STANTON,
Appellant

v

DISTRICT OF COLUMBIA
COURT OF APPEALS,
Appellee

APPEAL FROM THE DISTRICT OF COLUMBIA

COURT OF APPEALS

STATEMENT OF THE CASE

This appeal is from the final judgment of the highest court of the District of Columbia (DC) on the question of the validity of a DC Bar disciplinary procedure and of DC Bar disciplinary rules of practice challenged as repugnant to constitutional due process. The court (appellee) decided constructively in favor of the validity of the procedure and of the rules of practice.

The parties to this appeal

Appellant is a litigation attorney with an cohesive, valid view of his constitutional role as counsel for the accused in criminal cases. That view entitles appellant, in his judgment, freely to decide how best to help his clients lawfully defend themselves and get the best results.[1] Appellee is the highest court of the state in which appellant put his view into legal practice until suspended unconstitutionally and indefinitely by appellee. Appellee ordered appellant's suspension from practice following bar disciplinary proceedings that form the

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[1]The sixth amendment to the federal constitution guarantees to the accused in any criminal case "the assistance of counsel for his defense." In appellant's view, counsel should not assist the accused in articulating or entering a guilty plea and waiving his right to defend himself but should only advise the accused whether and how to plead guilty.

background of this appeal.

The United States (US) Congress has authorized appellee under DC Code (1981 Ed) Sec 11-2501(a) to make rules for the regulation and discipline of members of its bar. Appellee's exercise of this rulemaking authority raises the issues or questions presented in this appeal.

Appellee's disciplinary
action against appellant

Appellee's disciplinary agency, the DC Board on Professional Responsibility (BPR), held the view that attorneys should assist their clients by advocating for acceptance of their guilty pleas. The BPR admonished appellant to practice in compliance with this view. Appellant protested and rejected this admonition.

The BPR prosecuted disciplinary action against appellant after he informed a judge hearing a guilty plea that he had advised

the client not to accept the plea offer. The BPR prosecuted further disciplinary action against him after another client told a judge he had decided to plead guilty, then hesitated in indecision, and the judge proceeded to conduct a trial.

In the disciplinary proceedings appellant moved to dismiss the charges against him as vague and overbroad, raising the due process issue of fair notice. The BPR refused to hear and rule on appellant's motion before the factfinding stage of the disciplinary proceedings.

In its reports and recommendations to appellee on the disciplinary actions, the BPR rationalized the refusal to hear and rule on appellant's motion before making its findings. The BPR argued that disciplinary cases should not be decided on motions made before factfinding because procedural due process protections are

"inappropriate" in appellee's disciplinary system, which should proceed directly to factfinding on the merits of the charges, according to the BPR argument, and not be "detoured" into "complication" and "delay" by "procedural issues" or "motions practice." The BPR recommended adoption of a procedure by which the disciplinary factfinder proposes dispositions both as to the ultimate disposition on the merits and as to any motions, and the BPR then considers the proposed dispositions and recommends dismissal of any case in which the attorney was "not fairly notified of the charges against him."

On appellant's motion to dismiss the BPR ruled that "no fault" appeared on the face of the charges appellant had attacked. On the factual merits of the charges the BPR recommended indefinite suspension from practice for violations of DC disciplinary

rules DR6-101(A)(3) and DR7-101(A)(1) construed to obligate attorneys to pursue client objectives "as they see them" in "fidelity to the client's judgment."

In briefs and oral argument, appellant urged appellee to reject the BPR reports and recommendations. He contended that the reported findings depended on a vague, overbroad construction of DR6-101(A)(3) and DR7-101(A)(1) applied ex post facto. He contended that the BPR procedure of deferring ruling on motions violated due process rights of fair notice of the charges and opportunity to be heard on the fair notice issue. Appellee, however, ignored appellant's contentions, adopted the BPR reports and recommendations summarily as judicial opinions reported as In re Stanton, 470 A2d 272, 281 (DC 1983), cert denied 466 US 972, 104 SCt 2347 (1984), and ordered appellant suspended

indefinitely from DC practice. The BPR promulgated the adopted motions procedure as BPR Rule 7.12, now BPR Rule 7.13.

Appellant's civil rights
action against appellee

Appellant renewed his contentions by challenging BPR Rule 7.13 and the BPR DR6-101(A)(3)/DR7-101(A)(1) construction in a DC Superior Court action under US Code (1982 Ed) Sec 42-1983 to declare appellee's rulemaking in violation of due process under color of regulation of the legal profession. The DC government appeared for appellee in the Superior Court, which dismissed the action by disclaiming subject matter jurisdiction, finding that appellant's complaint presented

> not a general challenge to disciplinary rules but rather a challenge to an adjudication based on application of those rules to [appellant's] case.

An appeal from the dismissal made appellee tribunal as well as party in the case. Appellee recognized appellant's due process claims as general constitutional challenges but affirmed the dismissal order on different grounds.

As ground for affirming the dismissal of appellant's challenge to DR6-101(A)(3) and DR7-101(A)(1) appellee alleged that he had failed to mount that constitutional attack in the disciplinary proceedings "at the time his continuing license to practice law was at issue," making his "untimely challenge" in the Superior Court res judicata. Affirmance on this ground required misrepresentation of the record of the disciplinary proceedings.

Appellee affirmed the dismissal of appellant's challenge to BPR Rule 7.13 on the ground that such a claim is "not tantamount to a general constitutional

challenge to [appellee's] rules ... or the disciplinary rules of [appellee's] bar," expressly noting appellant's timely constitutional challenge in the disciplinary proceedings to the procedure of deferring ruling on motions until factfinding has been completed.

Appellant petitioned under appellee's rules for rehearing, arguing that appellee had misrepresented his renewed challenge to the disciplinary rules of practice as "untimely" and that appellee had decided constructively in favor of the constitutional validity of BPR Rule 7.13. In opposing appellant's rehearing petition, the government pointed out the "error" of "incorrectly stat[ing] that appellant did not in his direct appeals of the disciplinary actions challenge the constitutional propriety of the rules of practice promulgated by [appellee]." The

government suggested that appellee's memorandum opinion and judgment be amended to reflect the fact that appellant raised his constitutional claims at all stages of the disciplinary proceedings and that they were decided against him.

But appellee's allegation that appellant had failed in the disciplinary proceedings to raise his constitutional claims against DR6-101(A)(3) and DR7-101(A)(1) necessarily implied that appellee never decided them against him at that time. Appellee denied the rehearing petition without addressing the government's suggestion. Appellant then noted this further appeal here.

ARGUMENT: WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellee would force appellant to practice law according to its unofficial

view of the role of criminal defense counsel as advocate for guilty pleas. When appellant controverted that view, appellee prosecuted disciplinary actions to enforce it, even though the disciplinary rules of practice imposed no such obligation and no court decision ever gave notice of it.

When appellant raised the issue of fair notice appellee evaded it by the BPR Rule 7.13 procedure and then ignored the issue of opportunity to be heard raised by appellant's challenge to the procedure. Now appellee has evaded these due process issues again.

The issues or questions presented in this case are substantial and alarming. Plenary consideration is necessary if not briefs on the merits or oral argument, for the merits are so clear that further briefing and argument are unnecessary to resolve the issues or answer the questions.

The challenged procedural rule and statutory construction deny due process in attorney disciplinary cases and subvert the constitutional guarantee of assistance of counsel for defense in criminal cases.

BPR Rule 7.13 and procedural due process

Appellee evades an express decision on appellant's renewed constitutional challenge to BPR Rule 7.13 by distinguishing the rule from the General Rules of the DC Court of Appeals and from the DC Bar disciplinary rules of practice. This distinction is insignificant. Rules governing bar disciplinary procedure are subject to constitutional challenge under District of Columbia Court of Appeals v Feldman, 460 US 462, 103 SCt 1303 (1983), as attorney discipline imposes on a lawyer a punishment or penalty that entitles him to procedural due process, Razatos v Colorado Supreme Court, 746 F2d 1429, 1435

(CA10 1984), cert denied 471 US 1016, 105 SCt 2019 (1985), citing In re Ruffalo, 390 US 544, 88 SCt 1222 (1968). See also Howell v State Bar of Texas, 710 F2d 1075, 1078 (CA5 1983) (citing Feldman, supra, to establish jurisdiction over challenge to Texas disciplinary procedure).

Under federal law disciplinary proceedings are quasi-criminal, and attorneys are entitled to procedural due process, which includes fair notice of the charges, Ruffalo, supra at 550, 88 SCt 1226. The charges must be known before the factfinding stage of the proceedings commences, Id at 551, 88 SCt at 1226, or there can be no fair opportunity for explanation and defense, Id at 550, 88 SCt at 1226. For this reason, motions raising the issue of fair notice in bar disciplinary proceedings must be heard and decided before the factfinding stage if the

opportunity to be heard on the issue is to be "at a meaningful time and in a meaningful manner," Armstrong v Manzo, 380 US 545, 552, 85 SCt 1187, 1191 (1965).

BPR Rule 7.13 denies procedural due process to members of the DC Bar. Under BPR Rule 7.13 appellee may prosecute disciplinary actions against attorneys "not fairly notified of the charges against [them]," Stanton, supra at 285, as they confront the evidence presented to prove the charges and attempt to present evidence to refute them. They have no fair opportunity for explanation and defense because they cannot know what must be proved.

Appellee distinguishes disciplinary proceedings from criminal cases in excluding procedural due process as "inappropriate," Stanton, supra at 285, but defendants in civil cases have the right

under DC Superior Court Rule 12(b)(6) to a pretrial determination of whether complaints against them state claims on which relief may be granted, essentially a fair notice issue. Appellee's disciplinary proceedings lack the procedural due process protection available in both civil and criminal cases: the right to know prospectively, in advance, not retrospectively, after the fact, what the prosecutor must prove to establish guilt or liability.

The BPR statement that it would not hesitate to recommend, after making factual findings, dismissal of any case where the attorney was not notified fairly of the charges against him, Stanton, supra at 285, is no assurance of due process. This proposed posttrial remedy for an assumed pretrial due process violation cannot cure the risk of error (injustice) inherent in

appellee's disciplinary proceedings.

Appellee's disciplinary factfinder proposes a disposition of a motion to dismiss or clarify for want of fair notice together with an ultimate disposition (findings and conclusions) on the factual merits of the charges. A proposal to deny the motion is a proposal to consider the factual merits of the charges. A proposal to grant the motion is a proposal to dismiss without findings or to clarify before making findings, which cannot be reliable without fair notice and opportunity for explanation and defense. But appellee's factfinder always makes proposed findings, even when proposing to dismiss without findings or to clarify before making findings, and appellee considers such inconsistent proposals in disposing of disciplinary cases, defeating the purpose of procedural due process: to

minimize the risk of erroneous (unjust) decisions, Addington v Texas, 441 US 418, 425, 99 SCt 1804, 1809 (1979), Mathews v Eldridge, 424 US 319, 344, 96 SCt 893, 907 (1976).

In theory appellee's BPR Rule 7.13 procedure provides for inconsisent proposed dispositions in cases involving the fair notice issue. In practice, as appellant's case shows, the factfinder is unlikely to propose that a motion to dismiss or clarify for want of fair notice be granted, not if the BPR Rule 7.13 procedure is intended to prevent detours, complications, or delays. That intent would be frustrated by factfinding followed by a dismissal for want of fair notice followed presumably by the filing of amended or clarified charges and further factfinding. Instead, expediency would demand a proposed denial of the motion to dismiss or clarify,

probably in the form of a summary ruling, as in appellant's case, that there was fair notice of the charges proved by the evidence considered by the factfinder. As the factfinder proposes dispositions both as to the merits of the charges and as to the motion after hearing the evidence, the procedure shields vague, overbroad charges from effective due process attack.

The vagueness and overbreadth of appellee's disciplinary rules

Appellee evades an express decision on appellant's renewed constitutional challenge to the vague, overbroad BPR construction of DR6-101(A)(3) and DR7-101(A)(1) by misrepresenting the record of the disciplinary proceedings against him to allege waiver of his right to fair notice by his failure to challenge the construction when his continuing license to practice DC law was at issue. This alleged

waiver, in appellee's opinion, bars appellant's renewed challenge as res judicata.

The gross injustice of this misrepresentation moved the government, even while opposing appellant's rehearing petition, to suggest that the record be set straight to show that appellant raised his constitutional claims at all stages of the disciplinary proceedings. The government argued further that appellee had decided the claims against him, alluding to the BPR posttrial ruling that "no fault," Stanton, supra at 285, appeared on the charges appellant had attacked, but could cite no express BPR consideration of either appellant's contentions on the fair notice issue made in his motion to dismiss or his contentions on the issue of opportunity to be heard made in his challenge to the BPR procedure.

The government's argument, if accepted, would have brought appellee closer to the facts. Appellant had raised his claims in the disciplinary proceedings, and the BPR had addressed them, although in terms of expediency only and not due process. But by the time the government made its argument, appellee had committed itself to the allegation that appellant had waived his right to fair notice in the disciplinary proceedings and felt unable to accept the government's suggestion.

Appellee's allegation of waiver is unavailing in view of the BPR ruling on appellant's motion to dismiss the disciplinary charges and of appellee's noting of his challenge in the disciplinary proceedings to the constitutionality of the BPR procedure of deferring ruling on motions until factfinding has been completed. The meaning of the BPR "no

fault" ruling may not be immediately clear because the BPR offered no express consideration of appellant's contentions, but the only logical inference is that the ruling meant that appellant was "fairly notified of the charges against him," Stanton, supra at 285, proven by the evidence. Moreover, if during the disciplinary proceedings appellant challenged the procedure that deferred rulings on motions until after the evidence had been heard, he must have made a motion on which the BPR had deferred ruling. His challenge to the procedure, if constitutional, must have been based on fair notice of the charges. By noting appellant's challenge to the procedure, appellee confirms the inference that the BPR ruled posttrial on a motion to dismiss for want of fair notice and belies the allegation that appellant failed to

challenge the constitutionality of the BPR construction of the disciplinary rules of practice at the time his continuing license to practice was at issue.

One general limitation repeatedly recognized is that res judicata principles cannot apply when a party against whom a previous decision is asserted did not have a full and fair opportunity to litigate the issue in the previous case, Allen v McCurry, 449 US 90, 95, 101 SCt 411, 415 (1980), by reason of the doubtful quality, extensiveness, or fairness of procedure followed previously, Montana v United States, 440 US 147, 165, 99 SCt 970, 979 (1979). The BPR Rule 7.13 procedure followed in the previous disciplinary proceedings against appellant denied him a full and fair opportunity to litigate the issue of fair notice raised again in his civil rights action challenging the BPR

construction of DR6-101(A)(3) and DR7-101(A)(1). Appellee cannot apply res judicata principles to evade again an issue evaded in the previous action against appellant.

Appellee's evasiveness reflects the unfairness of the fact that appellant could neither foresee nor defend against the BPR construction of the disciplinary rules to obligate attorneys to pursue client objectives "as they see them," Stanton, supra at 276, in "fidelity to the client's judgment," Id at 289, on "fundamentally important decisions on which the client's views must prevail," Ibid. By this construction appellee found appellant in violation of the disciplinary rules for an "attempt to thwart his client's plea of guilty," Id at 287, when he informed a judge that he had advised the client not to accept a plea offer and for a "refus[al] to

assist [another client] in entering his plea," Id at 277, and "pursue the objective his client wanted him to pursue," Ibid, when the client became hesitant and indecisive and the case proceeded to trial. The decision to plead guilty is so "fundamentally important" that, once made, however ambivalently, hesitantly, tentatively, or even unwillingly, it obligates counsel to be its advocate, according to appellee's disciplinary rulemaking.

There may be applications of this rulemaking in other areas of the criminal law. In adopting the BPR construction of DR6-101(A)(3) and DR7-101(A)(1) appellee failed to distinguish "fundamentally important decisions" from "exclusively legal or technical matters which are committed to the discretion of the lawyer acting on the client's behalf," Id. In

effect, appellee has construed these disciplinary rules of practice in an "external effort to direct how the obligations to the client are to be carried out," Polk County v Dodson, 454 US 312, 327, 102 SCt 445, 454 (1981). As with all such efforts, appellee's rulemaking has substantial and ominous implications for the administration of criminal justice.

Subversion of the guarantee of assistance of counsel for defense

Under federal law counsel have "unfettered discretion, in the light of their training and experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced, Minns v Paul, 542 F2d 899, 901 (CA4 1976). Now appellee's disciplinary rules of practice make counsel

ordinary agents obligated to pursue client objectives "as they see them." By this rulemaking appellee attempts not merely to regulate but to control criminal defense practice in order to promote disposition of cases by guilty pleas.

Appellee insists that this construction of the disciplinary rules obligates counsel to abandon professional judgment, act as an ordinary agent, and pursue entry of the guilty plea on the assumption that the "client's judgment" favors this objective whenever a client expresses a desire or decision to plead guilty. This construction disregards the fact that the decision is often tentative and always subject to change. Many attorneys announce in court that their clients have decided to plead guilty and then discover that they have changed their minds. In all too many cases the client is

at best ambivalent about pleading guilty, yet appellee expects the attorney to represent that the client has decided to accept a plea offer and to argue why a plea bargain, with waiver of the client's right to defend himself against the charges, should be approved.[2]

A client's decision to plead guilty is never final until articulated personally and unequivocally to a judge. Appellant's practice recognizes the client's exclusive prerogative to decide whether to plead guilty. When appellant's client speaks up spontaneously in court to announce a decision to plead guilty, there hardly can be any question of voluntariness, the sole,

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[2]Because counsel's constitutional duty is to assist the client in defending himself, counsel should not, appellant believes, assist the client in waiving his right to defend himself. Appellee fails to show how practicing this belief violates any valid rule or risks harm to clients or to the administration of justice.

long-standing test of the validity of guilty pleas, Hill v Lockhart, 474 US 52, 56, 106 SCt 366, 369 (1985).

Appellee's concern is not with the voluntariness but with the volume of guilty pleas entered in the DC Superior Court. Appellee would pump up the volume at the expense of the voluntariness. Appellee's rulemaking can only discourage members of the DC Bar from litigation practice in criminal defense. As advocates for guilty pleas, DC lawyers may practice in compliance with appellee's disciplinary rules, but they cannot honor the constitutional guarantee of assistance for defense.

Conclusion

Whatever other applications appellee may find for DC disciplinary rules construed to enforce "fidelity to the client's judgment," it is unquestionably

clear that no attorney charged with violating this vague, overbroad obligation has a fair chance for defense under appellee's BPR Rule 7.13 procedure. The judgment on appeal should be reversed.

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APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 87-383

FILED
May 19 1988

JOHN J. STANTON,
Appellant

v. CA6177-86

DISTRICT OF COLUMBIA COURT OF APPEALS,
Appellee

Appeal from the Superior Court
of the District of Columbia
Civil Division

(Hon. A. Franklin Burgess, Jr., Trial Judge)

(Argued March 29, 1988/Decided May 19,1988)

Before PRYOR, Chief Judge, FERREN, Associate Judge, and KERN, Senior Judge.

MEMORANDUM OPINION AND JUDGMENT

Appellant challenges the trial court's dismissal of his complaint for, inter alia, lack of subject matter jurisdiction.[1] He

[1]The trial court found that appellant was, in essence, seeking further review of the merits of his case in earlier attorney discipline proceedings in this court. See

contends that the court had jurisdiction because his claims pose a general

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In re Stanton, 470 A.2d 272 (D.C. 1983) ("Stanton I"); In re Stanton, 470 A.2d 281 (D.C. 1983) ("Stanton II"), cert. denied, 466 U.S. 972 (1984) consolidated with Stanton I on petition for certiorari). The trial court held that it was without subject-matter jurisdiction over appellant's suit because only the United States Supreme Court may sit in review of judicial decisions of this court, District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983).

The trial court also found as further grounds for dismissal that the District of Columbia Court of Appeals was non sui juris. It is clear that bodies within the District of Columbia government are usually not suable as separate entities. Turner v. District of Columbia, 532 A.2d 662, 675 (D.C. 1987); Braxton v. National Capital Housing Authority, 396 A.2d 215, 216-217 (D.C. 1978). However, this court has sometimes treated such suits as having been brought against the District of Columbia generally rather than dismissing them for failure to name a suable defendant. See, e.g., Group Health Ass'n, Inc. v. District of Columbia General Hospital, No. 87-181, slip op. at 745 n. 1 (D.C. April 29, 1988); Miller v. Spencer, 330 A.2d 250, 251 n. 1 (D.C. 1974) (affirming dismissal on other grounds). Cf. Feldman, supra (naming this court a defendant but not deciding issue of amenability to suit). We do not reach the sui juris issue because we dispose of this case on other grounds.

constitutional challenge to the rules of this court rather than a specific challenge to earlier adjudications by this court. We affirm.

This court in 1983 approved and adopted a report and recommendation by the Board on Professional Responsibility ("Board") that appellant be suspended from the practice of law in the District of Columbia. See Stanton I & II, supra, note 1. The reasons for such suspension were that appellant had failed to accept instructions from his clients and neglected matters entrusted to his professional care, all in violation of the rules promulgated by this court to govern the practice of law by attorneys within the District of Columbia.[2] Appellant's

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[2]The District of Columbia Court of Appeals is authorized to "make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and

defense in Stanton I & II was that at all times relevant he had exercised his professional judgment in the best interests of his clients. So far as the record shows, appellant did not then challenge the constitutional propriety of the rules of practice promulgated by this court, which the Board and this court concluded he had violated.[3] In the instant proceeding,

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their censure, suspension, and expulsion." D.C. Code Sec. 11-2501(a) (1981). One such rule provides that "[t]he American Bar Association's Code of Professional Responsibility, as amended by the Court ... shall provide the standards governing the practice of law in the District of Columbia." D.C. Bar R. X. Accordingly, acts or omissions which violate the Model Code of Professional Responsibility "shall constitute misconduct and shall be grounds for discipline." D.C. Bar R. XI, Sec. 2.

[3]In Stanton II appellant did challenge the constitutionality of the Board's procedure of deferring ruling on a motion until factfinding had been completed. Such a claim, however, is not tantamount to a general constitutional challenge to the rules of this court or the disciplinary rules of its bar.

appellant alleges that the rules governing attorney practice are unconstitutionally vague[4] and have been unconstitutionally applied ex post facto to his style of legal practice.[5]

We find that appellant's contentions are claims which should have been litigated in Stanton I & II. The Supreme Court has held that

> the doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, "[i]t is a finality as to the claim or

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[4]The void-for vagueness doctrine embraces the principle that "a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Roberts v. United States Jaycees, 468 U.S. 609 (1984) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[5]See U.S. CONST. art. I, sec. 9, cl. 3. He also asserts a due process violation by the Board and this court in failing to entertain challenges to alleged procedural imperfections of the disciplinary process.

> demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Nevada v. United States, 463 U.S. 110, 129-130 (1983) (quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1877) (emphasis supplied). Given appellant's failure to mount his constitutional attack in this court at the time his continuing license to practice law was at issue here, we are constrained by principles of res judicata to uphold the trial court's dismissal of his untimely constitutional challenge.[6]

Accordingly, it is

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[6]It is well-settled that this court may sustain the judgment of the trial court on grounds different from those on which the trial court relied. District of Columbia v. Acme Reporting Co., 530 A.2d 708, 712 (D.C. 1987); Garrett v. Washington Air Compressor Co., 466 A.2d 462, 464 n. 5 (D.C. 1983).

ORDERED and ADJUDGED that the trial court's order granting appellee's motion to dismiss be, and the same is hereby, affirmed.

FOR THE COURT:

Richard B. Hoffman
Clerk

Copies to:

Hon. A. Franklin Burgess, Jr.

Clerk, Superior Court

John J. Stanton, pro se
1901 Columbia Road NW (09)

Charles L. Reischel, Esq.
Deputy Corporation Counsel

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

JOHN J. STANTON, :

Appellant :

v. : No. 87-383

DISTRICT OF COLUMBIA :
COURT OF APPEALS,

Appellee :

OPPOSITION TO PETITION FOR REHEARING
OR REHEARING EN BANC

The District of Columbia Court of Appeals, through counse, opposes Mr. Stanton's petition for rehearing or rehearing en banc. Mr. Stanton has seized on an immaterial error in the Court's memorandum opinion and judgment in this case and seeks rehearing on that basis alone. Petition at 3-6. The Court incorrectly stated that "appellant did not [in his direct appeals of the disciplinary actions] challenge the constitutional propriety of the rules of practice

promulgated by this Court ..." MOJ at 2.

In fact, as he alleged in his complaint, Mr. Stanton "[a]t all stages of the disciplinary proceedings ... objected to defendant's procedure as wanting in due process and to the charges against him as vague, arbitrary, and inconsistent with his constitutional responsibilities as defense counsel and thus overbroad ..." Complaint at para. 6. The Board did not "ignore" his claims, it considered them and decided they were without merit; this Court affirmed. In re Stanton, 470 A.2d 281, 284-285 (D.C. 1983). See also our brief at 2 and 5.

In our brief, at 4-5, we argued that res judicata barred Mr. Stanton's claims because they had been litigated and decided against him, not because they could have been raised but were not. As a practical matter, it makes no difference because res judicata bars relitigation not only of

matters that were previously litigated and decided, but also of those that might have been litigated. Nevada v. United States, 463 U.S. 110, 129-130 (1983).

At most, the MOJ should be amended to reflect the fact that Mr. Stanton raised his constitutional claims at all stages of the disciplinary proceedings, that they were considered, and that they were decided against him. In all other respects, the petition for rehearing should be denied.

Respectfully submitted,

FREDERICK D. COOKE, JR.
Corporation Counsel, D.C.

CHARLES L. REISCHEL
Deputy Corporation
Counsel, D.C.

SUSAN S. MCDONALD
Assistant Corporation
Counsel, D.C.

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Room 305
1350 Pennsylvania Avenue,
N.W.
Washington, D.C. 20004
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing opposition to petition for rehearing or rehearing en banc was mailed, postage prepaid, this 1st day of July, 1988, to John J. Stanton, 1901 Columbia Road N.W., Washington, D.C. 20009.

SUSAN S. MCDONALD
Assistant Corporation
Counsel, D.C.

DISTRICT OF COLUMBIA

COURT OF APPEALS

FILED
SEP 1 1988

No. 87-393

JOHN J. STANTON, Appellant,

v. CA6177-86

DISTRICT OF COLUMBIA
COURT OF APPEALS, Appellee

BEFORE; *Pryor, Chief Judge; Mack, **Newman, *Ferren, Belson, Terry, Rogers, Steadman, and Schwelb, Associate Judges; and *Kern, Senior Judge.

O R D E R

On consideration of the petition of appellant for rehearing or rehearing en banc, and the opposition thereto, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that the majority of the judges of this court has voted to deny the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

**Associate Judges Newman and Terry have recused themselves from this case.

Associate Judge Mack would grant rehearing en banc.

Copies to:

Honorable A. Franklin Burgess, Jr.

Clerk, Superior Court

John J. Stanton, Esquire
1901 Columbia Road N.W.
Washington, D.C. 20009

Charles L. Reischel, Esquire
Deputy Corporation Counsel

Case #87-383

DISTRICT OF COLUMBIA COURT OF APPEALS

JOHN J STANTON,
Appellant

Rec'd
23 Nov 1988

v

DISTRICT OF COLUMBIA
COURT OF APPEALS,
Appellee

NOTICE OF APPEAL

Appellant John J Stanton by this notice appeals under United States Code (1982 Ed) Sec 28-1257(2) to the Supreme Court of the United States from the 19 May 1988 memorandum opinion and judgment made final by the 1 September 1988 order denying rehearing.

JOHN J STANTON
1901 Columbia Road NW
Washington, DC 20009
Phone (202) 232-5369

Affidavit of Service

John J Stanton states under oath that

on 23 November 1988 he served by first class mail a copy of this notice on Susan S McDonald, Assistant Corporation Counsel, DC, District Building #305, 1350 Pennsylvania Avenue NW, Washington, DC 20004.

_____
JOHN J STANTON

Verification

John J Stanton appeared before me on 23 November 1988 and subscribed under oath to this affidavit.

Clerk, DC Court of Appeals

By: _____